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No. 87-140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BART B. CHAMBERLAIN, JR., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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REPLY MEMORANDUM

Of Counsel:
PHILIP A. LACOVARA
GEOFFREY F. ARONOW
HUGHES HUBBARD & REED
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 626-6200

KEITH A. JONES *
JOHN M. SIMPSON
FULBRIGHT & JAWORSKI
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-6800

* Counsel of Record

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TABLE OF AUTHORITIES

CASES: Page

Auditor of Public Accounts v. Izatt, 205 F.2d 785 (7th Cir. 1953) ---- 5
Bebchick v. Washington Metropolitan Area Transit Comm'n, 645 F.2d 1086 (D.C. Cir. 1981) ---- 8
E. I. du Pont de Nemours & Co. v. Lyles & Lang Construction Co., 219 F.2d 328 (4th Cir.), *cert. denied*, 349 U.S. 956 (1955) ---- 8
Mosser v. Darrow, 341 U.S. 267 (1951) ---- 6
Porter v. Warner Holding Co., 328 U.S. 395 (1946) ---- 5
Sheldon v. Metro-Goldwin Pictures Corp., 106 F.2d 45 (2d Cir. 1939), *aff'd on other issues*, 309 U.S. 390 (1940) ---- 6-7
Slodov v. United States, 436 U.S. 238 (1978) ---- 3, 5
Standard Oil Co. v. FEA, 453 F. Supp. 203 (N.D. Ohio), *aff'd*, 596 F.2d 1029 (TECA 1978) ---- 7
Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916) ---- 2
Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141 (4th Cir. 1975) ---- 4
United States v. Pollution Abatement Services, 763 F.2d 133 (2d Cir.), *cert. denied*, 474 U.S. 1037 (1985) ---- 4
United States v. The M/V Gopher State, 614 F.2d 1186 (8th Cir. 1980) ---- 8
Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967) ---- 4

STATUTES:

Economic Stabilization Act of 1970, *as amended*, 12 U.S.C. § 1904 note (1976) ----
Section 209 ---- 2, 5
Section 210 ---- 2, 5
15 U.S.C. § 754(a)(4) (1976) ---- 3
26 U.S.C. § 6672 ---- 3
Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ---- 4
Rivers and Harbors Act, 33 U.S.C. § 411 (1982) ---- 4
42 U.S.C. § 1983 ---- 4

TABLE OF AUTHORITIES—Continued

OTHER MATERIALS: Page

Restatement (Second) of Torts ---------- 2
Restatement of Restitution ---------- 6

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REPLY MEMORANDUM

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1. The brief in opposition confirms the significance of this case. The Solicitor General endorses and urges as correct the bald proposition that the federal courts, without statutory license and as a matter of federal common law, may impose unlimited personal liability "against individuals who cause corporate violations of statutes." Br. in Opp. 14. Although the Solicitor General attempts to portray that proposition as being firmly rooted in established principle, it is in fact novel and ominous. The very fact that the Solicitor General embraces the broad sweep of the decision below reaffirms that review should be granted to resolve this important question.

2. a. The government reasons that because at common law a corporate officer may be held personally liable for committing or causing a tort, federal courts may im-

pose personal liability whenever a corporate officer authorizes corporate transactions that violate a federal statute or regulation. But the government's conclusion does not follow from its premise. Corporate officers, like other individuals, are subject to tort law and thus are liable when they are tortfeasors. Personal liability should not exist, however, where the body of law creating the standard of conduct applies only to the corporation and not to the corporate officer himself. Where the legal duty that has been breached is one that is owed solely by the corporation, only the corporation should be liable.

Citing the *Restatement (Second) of Torts*, the government asserts that violations of statutes, and especially of price-control statutes, are in fact tortious. Br. in Opp. 10-11. The provision from the *Restatement* on which the government relies, however, stands only for the proposition that when a statute proscribes certain conduct without furnishing a civil remedy, courts may, in appropriate circumstances, imply a right of action at common law.[1] That proposition is irrelevant to the problem at hand, for it does not focus on the person against whom the remedy may be implied. Moreover, the particular statute here is representative of federal regulatory statutes generally in that it *does* furnish civil remedies. Section 210 of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 note (1976), grants an overcharged buyer a right of action against the seller for damages, and section 209 authorizes the government to sue the seller for restitution. The question in this case, therefore, is entirely different from the one with which the *Restatement* is concerned.

b. The issue here may be restated as follows: when a statute both proscribes certain corporate conduct and provides civil remedies against the corporation, may the federal courts (in the absence of factors that traditionally

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[1] This "doctrine of the common law" was applied in *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916), upon which the government also relies. Br. in Opp. 11.

would warrant piercing the corporate veil) create a cause of action against individual corporate officers as well?

Slodov v. United States, 436 U.S. 238 (1978), which the government unsuccessfully attempts to distinguish, Br. in Opp. 11 n.13, is highly instructive on this issue. *Slodov* concerned the construction of 26 U.S.C. § 6672, which imposes a penalty against certain corporate officers whose corporations fail to pay over withheld taxes. In deciding that the penalty did not apply on the facts of that case, this Court noted that, in accordance with general principles of corporate law, "Congress . . . has not made corporate officers personally liable for the corporation's tax obligations generally, and § 6672 therefore should be construed in a way which respects that policy choice." 436 U.S. at 254. That approach is fundamentally incompatible with what the court below did in this case.

Just as Congress did not make corporate officers personally liable for their corporations' taxes, it similarly did not make them liable for their corporations' overcharges. Instead, the price-control statute, like the tax code, imposed specific penalties on corporate officers only where they "knowingly and willfully" authorized unlawful corporate actions. 15 U.S.C. § 754(a)(4) (1976). It is undisputed, however, that petitioner Bart Chamberlain was not subject to those penalties, and the district court so held. Pet. App. 101a-102a. The court of appeals nevertheless ruled that even though Chamberlain is not liable for the statutory penalty, he is liable at common law for the entire amount of the corporations' overcharges. If that were truly the law, there would be no need for penalty statutes like 26 U.S.C. § 6672. Instead, a corporate officer would be faced with a general nonstatutory personal liability whenever he is responsible for his corporation's tax or other regulatory obligations. That, indeed, is the necessary implication of the government's position in this case.[2]

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[2] The position taken by the government is directly contrary, for example, to those cases that recognize that the corporate officer

c. The two cases upon which the government principally relies, *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141 (4th Cir. 1975), and *United States v. Pollution Abatement Services*, 763 F.2d 133 (2d Cir.), *cert. denied*, 474 U.S. 1037 (1985), *see* Br. in Opp. 11-14, do not support the more radical position that it advances in this case.

Tillman arose out of violations of the federal civil rights statutes. In subjecting both a corporation and its officers to liability for those violations, the Fourth Circuit used as its "starting point," 517 F.2d at 1143, the construction placed on 42 U.S.C. § 1983, which makes liable "[*e*]*very person who* . . . subjects or *causes to be subjected* any citizen . . . to the deprivation of any rights, privileges, or immunities" (emphasis added). There is no similar statutory predicate for the decision of the court of appeals in this case, and neither the court below nor the Solicitor General purports to find one.

Pollution Abatement arose under the Rivers and Harbors Act, which forbids certain types of water pollution and provides criminal sanctions against "every person . . . that shall knowingly aid, abet, authorize or instigate" such pollution. 33 U.S.C. § 411 (1982). The Act thus applies on its face not only to the corporations that engage in unlawful pollution but to the corporate officers who authorize it. The Act does not explicitly provide a civil remedy, but this Court earlier had found an implied right of action. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967). The Second Circuit in *Pollution Abatement*, expressly noting "the clear congressional intent to hold 'person[s]' liable for violations," 763 F.2d at 135, did no more than permit that right of action to be asserted against individual corporate officers whose own conduct quite plainly had been statutorily proscribed. *Pollution Abatement* furnishes no support for

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is not personally accountable for a corporation's defaults under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* *See* Br. in Opp. 17 n.18.

the holding below that, as a matter of federal common law, courts also may impose personal liability on corporate officers whose conduct Congress chose not to proscribe.

d. The government concedes, as it must, that "Congress can, of course, limit the persons against whom restitutionary (or other) remedies may be sought." Br. in Opp. 15 n.18.[3] But that is only half the story, and the lesser half at that. In devising remedies and imposing liabilities, courts properly are constrained not only by what Congress has done but also by what Congress has not done. If Congress has chosen not to make an individual's conduct unlawful, the federal courts and federal common law must "respect[] that policy choice." *Slodov*, 436 U.S. at 254. When Congress has made that choice, there is no basis in law for subjecting the individual to personal liability for the acts of the corporation of which he is an officer, director, employee, or shareholder (except where, unlike this case, the facts warrant the complete disregard of the corporate entity as a sham).

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[3] That is presicely what Congress did here. Section 210(b) of the ESA, like the statute at issue in *Auditor of Public Accounts v. Izatt*, 205 F.2d 785 (7th Cir. 1953), *see* Br. in Opp. 15 n.18, authorizes private actions for damages only against the person "selling goods and services who is found to have overcharged the plaintiff." The seller, of course, is the corporation, not the corporate officer.

Similarly, section 209 of the ESA authorizes the government to sue only the person who violates an "order or regulation." No order or regulation proscribed a corporate officer's conduct in authorizing nonwillful corporate violations of the price controls, and the government has never contended otherwise.

It should be noted, moreover, that section 209 is the indirect successor of the statute at issue in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), which the government also cites, Br. in Opp. 15. *Warner Holding* allowed recovery of restitution from an overcharging corporation as an adjunct to injunctive relief, but nothing in the Court's opinion even remotely suggests that corporate officers could have been held personally liable for the corporation's overcharges.

This principle of judicial restraint is of great practical importance in the context of the federal regulation of corporate transactions, where the governing statutes commonly, as was the case here, address the conduct of the corporation and define the limited circumstances in which corporate officers may be made personally accountable. This important principle was violated by the decision below.

3. In defending the lower court's award of "restitution" against Bart Chamberlain, the government does not even pause to acknowledge the statutory limitation on such restitution to "moneys received." Instead, the government apparently argues that general restitutionary principles permit the courts to cast their nets more widely, without regard to any limitation that Congress may have imposed. Br. in Opp. 18. That argument is manifestly erroneous. When Congress limits liability to "moneys received," it should go without saying that the courts have no writ to expand that liability also to cover moneys not received.

In addition, the government offers no relevant authority for its aberrant view of general restitutionary principles. The government disparages the authorities cited in the petition, including the *Restatement of Restitution*, as "textbook generalities," but it offers as a "sufficient counterexample" only *Mosser v. Darrow*, 341 U.S. 267 (1951). Br. in Opp. 18. Yet *Mosser* did not even address the scope of restitution as an equitable remedy; indeed, the word "restitution" appears nowhere in the opinion. The Court merely sustained the power of a bankruptcy court to surcharge a trustee for allowing wrongful dissipation of the trust corpus. That application of the principles of fiduciary duty has nothing to do with the issues here.[4]

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[4] The government also cites *Sheldon v. Metro-Goldwin Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939), *aff'd on other issues*, 309 U.S. 390 (1940). Br. in Opp. 18. But *Sheldon* involved the liability of

4. The government twice implies that the judicial imposition of unlimited personal liability in this case should be acceptable because Bart Chamberlain, who had sought and obtained an opinion from private counsel that his corporations' transactions would be lawful, nevertheless "did not avail himself of the opportunity to seek an opinion . . . from the Federal Energy Office." Br. in Opp. 3. *See also id.* at 17 n.19.

In effect, the government is suggesting that unless corporate officers go to it for legal advice, rather than to private counsel, they perforce must act at their personal financial peril when supervising the conduct of corporate business. That suggestion runs directly counter to normal assumptions about how business should be conducted in a free society. It would be totally impractical, moreover, to require that corporate officers, in order to protect themselves against ruinous personal liability, must seek legal approval from the government for each and every corporate action that is subject to federal regulation. Experience with the Federal Energy Office ("FEO"), and with its successor, the Federal Energy Administration ("FEA"), bears this out. "The problem of delay in furnishing prompt interpretations appears to have been endemic to the FEA's Office of General Counsel." *Standard Oil Co. v. FEA*, 453 F. Supp. 203, 216 n.69 (N.D. Ohio), *aff'd*, 596 F.2d 1029 (TECA 1978). Bart Chamberlain could not have secured a timely legal opinion from the agency even if he had tried.

If the FEO had been in a position to respond promptly to private requests for legal opinions, however, there is no doubt that it would have advised Bart Chamberlain in 1974 that his corporations' proposed transactions were lawful. The Department of Commerce contemporaneously "contacted FEO's General Counsel, who offered no objec-

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shareholders, not corporate officers. Even the court below agreed that there was no basis for holding Bart Chamberlain liable in his capacity as a shareholder. Pet. App. 11a.

tion to the proposed transaction and advised that there appeared to be no legal basis for denying the applications." Pet. App. 60a. Moreover, "[t]he transactions were later scrutinized by attorneys from a United States Attorney's Office, from the Department of Justice, and from the FEA. In terminating that investigation, it was the opinion of each attorney that 'if petroleum was exported pursuant to a valid export license, . . . the FEA price regulations did not apply to that sale.'" *Id.* at 60a-61a. The Administrator of the FEA confirmed that view in "a letter to a Congressional committee investigating the transactions." *Id.* at 61a. The government's present legal position in this case evolved long after the fact.

5. The government claims that the court of appeals did not usurp the district court's remedial discretion when it rejected the trial judge's use of the forum rate of prejudgment interest and, without remanding, substituted its own preferred schedule of interest rates. But the three cases upon which it relies, *see* Br. in Opp. 22-23, do not support that claim.

The government's first case, *Bebchick v. Washington Metropolitan Area Transit Comm'n*, 645 F.2d 1086 (D.C. Cir. 1981), is completely inapposite. The court was reviewing agency action, and the agency itself had considered the matter of prejudgment interest to be "beyond its jurisdiction." *Id.* at 1093. *Bebchick* says nothing about the proper allocation of remedial discretion between trial and appellate courts.

In the second and third cases, *United States v. The M/V Gopher State*, 614 F.2d 1186 (8th Cir. 1980), and *E. I. du Pont de Nemours & Co. v. Lyles & Lang Construction Co.*, 219 F.2d 328 (4th Cir.), *cert. denied*, 349 U.S. 956 (1955), the appellate courts thought the forum rates were too low and too high, respectively. But in each case the appellate court remanded to the trial court for final determination of the proper rate. The decision

below, in which the appellate court occupied the entire field of remedial discretion, stands alone.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
PHILIP A. LACOVARA
GEOFFREY F. ARONOW
HUGHES HUBBARD & REED
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 626-6200

KEITH A. JONES *
JOHN M. SIMPSON
FULBRIGHT & JAWORSKI
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-6800

* Counsel of Record

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